SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 998

EDWARD PAGE GASTON,

vs. *Petitioner,*

UNITED STATES OF AMERICA,

PETITIONERS' BRIEF IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia is set forth in the Transcript of Record (R. 30-31).

Grounds on Which the Jurisdiction of This Court Is Invoked.

Petition to which this brief is attached sufficiently states the grounds on which the jurisdiction of this Court is invoked.

Statement of Case.

Petition to which this brief is attached sufficiently states the facts that appear to be material to a consideration of the questions presented.

Specification of Errors Assigned.

1. The Courts below erred in holding that no variance existed between the Information and the proof that affected the substantive rights of the petitioner.

2. The Court below erred in not finding and holding that the Information failed to properly advise and notify the petitioner of the exact charge against him.

3. The Court below erred in finding and holding that the statute under which the prosecution was brought did not require an intent to violate the law and that scienter was not a necessary element of the crime.

4. The Court below erred in finding and holding that the Information charged more than one offense.

Summary of Argument.

1. A definite variance existed between the Information and the proof that affected the substantive rights of the petitioner, and the Government in electing to describe the uniform in detailed particularity was required to prove each and every descriptive averment.

2. Petitioner was not properly informed by the Information of the exact nature of the charge against him and just what he would be requird to meet in order to properly prepare his defense.

3. The statute under which this prosecution was brought requires an intent to violate the law and scienter is a necessary element of the crime.

4. The Information contained only one charge against the petitioner, and that was the alleged unlawful wearing of the duly prescribed uniform of a Captain in the United States Army.

Argument.

1. A definite variance existed between the Information and the proof that affected the substantive rights of the petitioner, and the Government in electing to describe the

uniform in detailed particularity was required to prove each and every descriptive averment.

The petitioner was specifically charged with not being an officer or enlisted man in the United States Army, did wear the duly prescribed uniform of a Captain in the United States Army; and two "U. S." insignias on coat lapels, Captain's bars on shoulders against the form of the statute in such case made and provided, and against the peace and Government of the United States of America (R. 1). In support of the charge the Government offered petitioner's uniform in evidence and contained on the coat lapels were two insignias "U. S." with the letters "N. Y." superimposed thereon.

Colonel John R. Hann, a Government witness on cross examination was shown the uniform and accordingly stated "*that the uniform was the same as that worn by a Captain in the New York National Guard, and that the insignia "U. S." with the letters "N. Y." contained thereon was the correct designation of the New York National Guard*". In order for the proof to conform with the Information the petitioner should have been charged with not being an officer of the National Guard a component of the Army of the United States, did wear the duly prescribed uniform of a Captain in the New York National Guard; and two insignias "U. S." with "N. Y." superimposed thereon, Captain's bars on shoulders against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

In the case of *Harry Berger* v. *United States of America* 295 U. S. 78; 79 L. Ed. 1314 this Honorable Court in laying down the rule as to variance stated:

> "The true inquiry, therefore, is not whether there has been a variance of proof, but whether there has been such a variance as to "affect the substantial rights of

> the accused". The general rule that allegations and proof must correspond is based upon the obvious requirements (1) That the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense".

It is respectfully argued that the rights of the petitioner were subsantially affected by the variance that existed, and the petitioner was not definitely informed of the exact charges against him, and that being of the belief that he had been within his lawful right in wearing the uniform of the New York National Guard on certain occasions, petitioner was taken by surprise when the records of the National Guard Bureau failed to disclose his name as an officer on the retired list. Mr. Gaston was of the belief that his name was so contained by reason of the official notices which he had received over a series of years recognizing him as a member of the Organized Reserves, War Department.

In the case of *Kutler* v. *U. S.*, 79 F. 2d 440, the Appellate Court in reversing the judgment below stated:

> "A false description of a person, where such description is essential constitutes a fatal variance. Where there is an allegation which describes, defines, qualifies, or limits a matter material to be charged, it is taken as a descriptive averment, and the general rule is it must be proved as laid even though particularity of description was unnecessary".

The Government is alleging in the Information that the uniform worn by petitioner was the duly prescribed uniform of a Captain in the United States Army, two "U. S." insignias on coat lapels, Captain's bars on shoulders, were

accordingly bound to prove each and every allegation, and it is submitted that they failed to prove the same.

In the cases of *District of Columbia* v. *Belt and District of Columbia* v. *Libbey* reported in 9 App. D. C. 321, the two cases were heard together on appeal, the questions of law involved being the same, the Court in sustaining a directed verdict for the defendants below stated:

> "The reasonable strictness required in criminal prosecutions—and the present is a criminal prosecution, although only for a misdemeanor—that the allegations and the proofs should conform to each other, would scarcely support an information for the alleged unlawful occupation of a park or parking, when the fact is there is no park, but only a vacant space liable some day at the will of the municipality to be converted into a park. Whatever, therefore, may have been the offense of the appellees, the trial Court was justified, under the facts disclosed in the record, in directing a verdict of acquittal on the charge of trespassing on a park or parking."

In the present case, an acquittal or a conviction on the charge contained in the Information would not be a bar to a further prosecution charging petitioner with wearing without right, the duly prescribed uniform of a Captain in the New York National Guard, a component of the Army of the United States.

In *State* v. *Levi Lashus* reported in 67 Maine 564, the allegation in the indictment charged the defendant kept and maintained a common nuisance, to wit: A certain building occupied by him as a store and shop on the Plains, so called in Waterville. The evidence showed that there is a settlement in Waterville, known as the Plains where the respondent's residence was, but at least one third of a mile from his place of business, which was on Silver Street in the vil-

lage of Waterville. The Appellate Court in sustaining the exceptions stated:

> "The respondent may have been guilty of maintaining a common nuisance at both, or either, or neither of these places. The Government, having designated the place of the nuisance, must be restricted to evidence to that locality. To allow the Government to substitute another place for that alleged in the indictment would be to change the issue and try the respondent on a charge other than that found by the Grand Jury. An acquittal or conviction, moreover, upon this indictment would be no bar to a second indictment charging the respondent with maintaining a nuisance on Silver Street".

The Government in failing to prove the uniform to be that of a Captain in the United States Army, but that of the New York National Guard did not sustain the burden of proof, and it is respectfully urged that in charging the offense in such descriptive detail, it became the prosecution's burden to prove the charge as laid.

In *State* v. *Langley,* 34 N. H. 529, the Court held:

> "When an indictment contains an allegation which is descriptive of some matter material to be charged, the allegation can never be rejected as surplusage, but must be proved as laid. If in describing any person or thing necessary to be set forth in the indictment, it is done with circumstances of more minuteness and particularity than is required, those circumstances all become material, and must be proved as laid, otherwise the person or thing shown by the proof will not appear to be identical with that alleged".

The question of variance was either overlooked or misconceived by the Municipal Court of appeals and whose opinion was adopted by the Court below, unless it can be

inferred from the following statement was directed to this particular question (R. 24):

> "We are unable to accept defendant's theory that because the uniform he wore was that of the New York National Guard, in that to the complete uniform of a captain of the United States Army the letters "N. Y." were super imposed on the insignia he cannot be charged with wearing the "duly prescribed uniform of the United States Army" • • •

It is urged that the question of pleading directed to the existent variance remains unanswered.

2. The Court below erred in not finding and holding that the Information failed to properly advise and notify petitioner of the exact charge against him.

The record clearly indicates that petitioner at all times, including the date of the alleged offense, considered himself within his lawful rights in wearing the uniform of Captain of the New York National Guard under certain conditions and circumstances (R. 6 and 13). Section 1393, Title 10 U. S. C. A. contains the following exceptions:

> "Provided, That the foregoing provision shall not be construed so to prevent officers or enlisted men of the National Guard from wearing in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers or enlisted men of the National Guard".

After excepting under stated conditions members of certain organizations, and instructors and members of cadet corps of public high schools and universities, the statute further provides:

> "That uniforms worn by officers or enlisted men of the National Guard, or by members of the military societies or the instructors and members of the cadet corps referred to in the preceding proviso shall include some distinctive mark or insignia to be prescribed by

the Secretary of War or the Secretary of Navy to distinguish such uniforms from the uniform of the United States Army, Navy, Marine Corps and Coast Guard * * *.

Regulation of the War Department AR 600-40 dated August 14, 1942, paragraph 20, Sect. (b) (1) reads as follows:

> "Reserve officers not members of the regular army, not on active duty and within the limits of the United States or its possessions, may wear the uniform on occasions of military ceremony, at social functions and informal gatherings of a military nature * * *.

It is a conceded fact that petitioner never applied for Federal recognition as an officer in the National Guard, nor did he claim that such steps had ever been taken (R. 14). He did however maintain at all times that it was his understanding that Federal recognition of the 1st Brigade, New York State Guard as the 87th Brigade automatically qualified him as an officer with the rank of Captain in the New York National Guard, and being abroad at the time of federalization of his unit, he was never advised otherwise. Some years later on his return to the United States he was notified of his honorable discharge (Exhibit 3), and which reads as follows:

> "Private Company E, 71st Infantry, May 16, 1918; Commissioned 2nd Lt. 1st Brigade (Aide) July 30, 1918; Captain Nov. 25, 1918; placed on State reserve list, Dec. 30, 1918; honorably discharged therefrom Oct. 11, 1926.
>
> For the Adjutant General,
> C. P. LENART,
> *Lt. Colonel A. G. D. N. Y. N. G.,*
> *Director Personnel Bureau.*

From the certificate alone, it is respectfully submitted, petitioner had reason to believe that he was being honorably

discharged from the New York National Guard and not the New York State Guard. The certificate was signed by an officer of the National Guard and not the State Guard.

As to petitioner's belief of status we refer to excerpts from the opinion of the Court below (R. 30):

> * * * "It may well be that he was unreasonable in his belief that he was entitled to wear the uniform of his former rank on special occasions. Nevertheless, he is a man of seventy-four years of age who took great pride in the fact that he had once been a Captain in the New York State Guard. Although he was honorably discharged and never given the status of a reserve officer, he appears to have convinced himself, by reason of certain notices from the Reserve Officers Association of the United States mistakenly addressed to him as Captain and by reason of his membership in the United States Infantry Association, that he had the right to wear the uniform on special occasions * * *.

The notices referred to as having been mistakenly sent to the petitioner were from the Organized Reserves, War Department, and are included in Exhibits 9 to 11 and 13 to 18 inclusive. These notices came over a period of years and Exhibit 9, bears date of May 23, 1935 and contains a list of officer's names, and in which group petitioner's name appears on the reverse side, line 33 under heading, Name, Grade, Section and Organization, as *Gaston E. P. Infantry, New York National Guard.* There were other notices more particularly Exhibits 13 and 17 bearing dates of February 8, 1938 and January 21, 1938 respectfully.

Petitioner later joined the United States Infantry Association and to show necessary requirements for admission offered in evidence Article 4, Section 2 of the Constitution of that association, Exhibit 6, and which reads as follows:

"The following persons shall be eligible to be active members. Commissioned Officers of the infantry arm,

active or retired, of all components of the Army of the United States; general officers, active or retired, of the Army of the United States; commissioned officers of other Arms and the Services and Bureaus of the Army of the United States who were ever commissioned in the Infantry Arm."

In addition to the foregoing evidentiary facts to support petitioner's belief that he was within his rights in wearing the uniform in question, we refer to (R. 12-13) the petitioner having testified that during the year of 1937 and while in New York City he was interviewed by an agent of the Federal Bureau of Investigation, and whose name he believes to be Walcome and that the agent in substance said "If I were you I would carefully preserve these credentials, evidently there is some mistake".

Notwithstanding the fact that petitioner has never complied with the regulations and conditions necessary to obtain a commission in the National Guard, the fact of his status in the New York State Guard, the federalization of that unit, the honorable discharge signed by an officer of the New York National Guard, his membership in the Reserve Officer's Association of the United States, the many notices received from the War Department, Organized Reserves, the prior investigation by the Federal Bureau of Investigation most certainly gave him reason to believe that he had a status in the New York National Guard.

Col. John R. Hann who was in charge of the National Guard Records, War Department, Washington, D. C., was not quite certain of the petitioner's status notwithstanding his access to the records and when he was asked by counsel for the Government on direct examination (R. 10).

* * * "Whether an officer of the National Guard Unit to which Mr. Gaston originally belonged would be entitled

to wear the insignia (meaning "U. S." with "N. Y. superimposed) unless he was federally recognized as such an officer, and his reply was that he did not know * * *

The witness was asked in substance on cross examination:

"Whether or not in his opinion, did the defendant have the right to wear the uniform that had been shown, and which he had identified as a New York National Guard uniform, on occasions of ceremony, and he replied in substance that he did not know he was going to be called on to answer such a question, but did not want the record to show that he did not know, and after much deliberation, the witness later stated in answer to the question on cross examination as to whether Captain Gaston was authorized to wear the particular uniform in question on November 14, 1942, that "He may—he could have been authorized to—wait a minute. No".

In view of all the foregoing facts petitioner feels that the Information did not sufficiently advise or put him on notice that his New York National Guard status was in question.

3. The Court below erred in finding and holding that the statute under which the prosecution was brought did not require an intent to violate the law and that scienter was not a necessary element of the crime.

The Court below in its opinion (R. 30-31) stated:

"The only theory on which the defendant's conviction could be reversed is that the statute under which he is convicted requires an intent to violate the law as well as an intent to wear the uniform. Unfortunately for the defendant the statute is not capable of such a construction. If a defendant intentionally wears a duly prescribed uniform of the United States Army or any distinctive part of such uni-

form he is guilty under the statute if his act is actually unlawful regardless of his belief in the propriety of his conduct."

The statute makes no mention of intent and unquestionably whether or not scienter is a necessary element of the crime, is a question of legislative intent to be answered by construction of the statute. Section 1393, Title 10 U. S. C. A. makes any of the following acts a violation:

"It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy or Marine Corps to wear the *duly prescribed uniform of the United States Army, Navy or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy or Marine Corps.*"

It goes without argument that there are three distinct methods in which the statute may be violated and most certainly it was never the legislative intent that a person wearing a *distinctive part of such uniform* with no intent to violate the law would be guilty by the mere wearing of Aviator's Wings, Officer's insignias, Official letter "U. S." all of which are worn by certain civilians, more particularly women as a token in memory of some one in the service.

The opinion of the Municipal Court of Appeals adopted by the Court below (R. 26) states:

"Nothing in the record, other than may be implied from wearing the uniform, indicates that the defendant intended to impersonate or represent himself as an Officer in the Army. He is seventy four years of age. His presence at the "canteen" was not for personal gain but to invite service men to a "canteen" conducted by a local church."

* * *

It is therefore respectfully contended that the petitioner was acting in good faith and so far as the record shows (R. 30) *without intent to violate the law and without the knowledge of the illegality of his act.* In enacting the statute in question, it can be reasonably inferred that the purpose and legislative intent was to stop impersonations by persons wearing the uniform without right. The question of intent appears to have been fully covered in the case of *United States* v. *Frank Balint*, 258 U. S. 250, 66 L. ed. 604, and in which case this Honorable Court held that intent or knowledge were not necessary to sustain a conviction on the particular statute, and the Opinion of this Court stated:

> * * * While the general rule at common law was that scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes, even where the statutory definition did not in terms include it, there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is the question of legislative intent to be construed by the Court * * *

Following the foregoing case, where a statute by words does not make intent a requirement, it is the duty of the Court in every case to construe the legislative intent, and accordingly we respectfully submit that the construction of the legislative intent in the instant statute is that violation of the same requires intent and knowledge.

4. The Information contained only one charge and that was the alleged unlawful wearing of the duly prescribed uniform of a Captain in the United States Army.

The Municipal Court of Appeals in its opinion (R. 24) stated:

> "The information is not limited to the charge that defendant wore "the duly prescribed uniform of a cap-

> tain in the United States Army" but in addition "and two 'U. S.' insignias on coat lapels, captain's bars on shoulders." This is charged "against the form of the statute in such case made and provided."

The Court below in adopting the opinion accordingly so held, and we submit that such construction of the Information is error. Section 1393, Title 10, U. S. C. A. makes the offense possible in 3 distinct ways:

> * * * *To wear the duly prescribed uniform of the United States Army, Navy or Marine Corps—or any distinctive part of such uniform—or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy or Marine Corps* * * *

The Information does not charge the petitioner with wearing a distinctive part of a uniform, nor does it charge him with wearing a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, *but it does charge him with wearing the duly prescribed uniform of a Captain in the United States Army,* and then goes on to describe the uniform, however the Municipal Court of Appeals by its opinion must have inferred that the wearing of Captain's bars, "U. S." insignias with "N. Y." super imposed thereon constituted separate offenses (R. 24)

> "We have held that where an information charges several acts, each of which constitutes a violation of a statute, proof of any one violation is sufficient to sustain a judgment or conviction"

citing *Carpenter* v. *District of Columbia Mun. App. D. C.,* 32 A. 2nd 251, 71 W. L. R. 680, and in view of the fact that the opinion was adopted by the Court below, it leaves one in doubt whether or not the conviction was based on the actual charge of wearing the duly prescribed uniform of a

Captain in the United States Army, or whether it was based on the wearing of the bars or insignia. We submit that under the Information there was only one charge and that was specific and a conviction based on any charge other than the wearing of the duly prescribed uniform of a Captain in the United States Army is error.

Conclusion.

Wherefore, the premises considered, it is respectfully submitted that the decision below clearly was in error and should be reviewed by this Court. Accordingly, the writ prayed for should issue.

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